UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN and ANITA BURNS,	)	
	)	
Plaintiffs	)	
	)	
v.	)	**Civil no. 00-89-B-S**
	)	
THE TOWN OF LAMOINE, et al.	)	
	)	
Defendants	)	

ORDER AND MEMORANDUM OF DECISION

SINGAL, District Judge

Plaintiffs John and Anita Burns, appearing pro se, have filed this action against twenty-two defendants, including Defendant Albert Frick. Before the Court is Defendant Frick's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (Docket # 23), which the Court has elected to treat as a motion for summary judgment according to Fed. R. Civ. P. 12(b) and 56. (See Order Treating Mot. to Dismiss as Summ. J., Sept. 21, 2000 (Docket #38).) For the reasons discussed below, Defendant's Motion to Dismiss, treated as a motion for summary judgment, is GRANTED.

I. STANDARD OF REVIEW

Federal courts grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the facts "in the light most amicable to the party contesting summary judgment, indulging all

reasonable inferences in that party's favor." Pagano v. Frank, 983 F.2d 343, 347 (1st Cir. 1993). Pursuant to this standard, the Court lays out the relevant facts below.

II. BACKGROUND

The Complaint alleges that Plaintiffs John and Anita Burns are residents of North Reading, Massachusetts, who own property in the Town of Lamoine, Maine. Wishing to obtain a permit to install a septic system on the property, they hired Theresa Davis, a licensed private soil evaluator, to analyze the soil and issue an evaluation supporting a permit application. Davis found that the soil was suitable for a septic system, and based on her analysis the Burns's received from the Town subsurface wastewater permit #519 on July 23, 1991.

On August 5, 1991, however, Davis and government employees – including Jay Hardcastle, an employee of the Maine Department of Human Services ("DHS"), and John Fink, a Town plumbing inspector – visited the Burns's property and conducted a second site evaluation. Upon completing this second evaluation, they determined that the soil on the property was unfit for a septic system, and Fink sent the Burns's a letter informing them that permit #519 was revoked.

Undaunted by the revocation of permit #519, John and Anita Burns sought other soil scientists who would prove that their land was fit for a septic system. In 1992, the Burns's hired Albert Frick, a licensed private soil evaluator, to examine their property and produce an evaluation that their land was fit for a septic system. They wrote a check to Frick for $894.47. After analyzing the properties of the soil at the Burns's property in Lamoine, Frick declined to provide the Burns's with a positive evaluation. Instead, Frick

terminated the working relationship between himself and the Burns's and returned their check, which the Burns's received with a letter on or about October 28, 1992.

Claiming that permit #519 was revoked in violation of their Fifth and Fourteenth Amendment rights, the Burns's filed a complaint on July 23, 1998 against three defendants: the Town of Lamoine, John Fink and Sally Bell. See Burns v. Town of Lamoine, 43 F. Supp. 2d 63 (D. Me. 1999). Construing Plaintiffs' complaint as a civil rights claim under 42 U.S.C. § 1983, the Court granted the defendants' motion for summary judgment on March 11, 1999 on the basis that the Burns's claim was barred by the statute of limitations. See id.

On or about July 17, 1999, the Burns's obtained another permit for a subsurface waste disposal system, permit #904.[1] This permit was based on a positive site evaluation conducted by Dennis Curran, another licensed private soil evaluator. Thereafter, town officials and others – including Albert Frick – allegedly attempted to cause permit #904 to be revoked, in violation of the Burns's constitutional rights.

On May 3, 2000, the Burns's filed a new Complaint against the three defendants of the prior lawsuit as well as nineteen other parties, including Frick. In regard to Frick, the couple allege that

> The Defendant Albert Frick, Did conspire with Defendant Jay Hardcastle, Defendant Kenneth Meyer and various [Maine Division of Health Engineering] employees, Et Al to deprive Plaintiff's John and Anita Burns of their Constitutional rights of protection under the 5th and 14th amendments of the U.S. Constitution and U.S. Ch. 42 §§ 1983, 1985, 1986. [sic]

[1] Because the Complaint only vaguely describes the circumstances surrounding permit #904, this Court incorrectly stated in a previous order that the Town had revoked permit #904. (See Order & Mem. of Decision Granting Def. Davis' Mot. to Dismiss at 3 n.3, Sept. 21, 2000 (Docket #37).) John Burns' affidavit, filed on October 4, 2000, alleges that permit #904 has been issued and has never been revoked, although certain defendants have tried to cause its revocation.

(Pl.'s Compl. ¶ 31 (Docket #1).) The Court has dismissed Plaintiffs' claims against Hardcastle and Meyer, who both worked for the Division of Health Engineering, which is part of the DHS. (See Order Granting Defs. Hardcastle et al.'s Mot. to Dismiss, July 20, 2000 (Docket #16); Order Granting Def. Meyer's Mot. to Dismiss, Aug. 8, 2000 (Docket #30).)

After being served with a copy of the Complaint, Defendant Frick allegedly filed a written complaint with the State of Maine on July 31, 2000, in which he challenges the issuance of permit #904. Attached to an affidavit, Plaintiffs have filed a photocopy of the complaint that Defendant sent to the State Attorney General's Office. (See John Burns Aff., Attach. 1 (Docket #42).) In the complaint, Frick argues that the Burns's property does not meet the minimum standards necessary for subsurface wastewater permits, asserts that Curran's evaluation was erroneous, and suggests that the government should revoke permit #904.

III. DISCUSSION

Plaintiffs assert counts against Defendant Frick pursuant to sections 1983, 1985 and 1986 of the Civil Rights Act, 42 U.S.C. §§ 1981 – 2000bb-3. In his defense, Defendant argues that (1) the statute of limitations bars any recovery against him, (2) section 1983 does not apply to him because he did not act under color of law, and (3) Plaintiffs fail to allege sufficient facts to support their claims.

A. Statutes of Limitations

Plaintiffs take issue with the fact that Defendant withdrew from providing services as a soil evaluator for Plaintiffs in October 1992. Whether or not Defendant's unilateral decision to stop working for Plaintiffs amounts to a cause of action under the Civil Rights Act, the eight-year duration between October 1992 and the filing of this lawsuit in May 2000 is a sufficient amount of time to extinguish Plaintiffs' claims regarding this termination of services. (See Order & Mem. of Decision Granting Def. Davis' Mot. to Dismiss at 7-11, Sept. 21, 2000 (Docket #37).[2]) Thus, the alleged events of 1992 are not material to Plaintiffs' claims against Defendant.

B. Defendant Allegedly Attempting to Cause the Revocation of Permit #904

Ignoring the issue of Defendant's refusal to continue working for Plaintiffs in 1992, the only factual issue remaining is Defendant's alleged attempts to cause the government to revoke permit #904. Plaintiffs have filed with the Court a photocopy of the complaint that Defendant sent to the State Attorney General's Office. (See John Burns Aff., Attach. 1 (Docket #42).) Because Defendant filed such a complaint with the State of Maine, there is little doubt that Defendant is trying to cause the revocation of permit #904. Nonetheless, Plaintiffs have failed to show that Defendant's actions violate the law.

[2] In this prior order, the Court found that Plaintiffs' claims against a different defendant were time-barred because the applicable limitations period in Maine for claims made pursuant to sections 1983 and 1986 is six years, and the limitations period for section 1985 claims is one year. (See Order & Mem. of Decision Granting Def. Davis' Mot. to Dismiss at 7-11, Sept. 21, 2000 (Docket #37).) The Court hereby incorporates into this Order and adopts the prior discussion regarding statutes of limitations. (See id.)

1. Section 1983 Claim

Section 1983 of the Civil Rights Act creates a cause of action against persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia" who are responsible for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws…". 42 U.S.C. § 1983. Thus, to state a claim under section 1983, "a plaintiff must allege (1) the violation of a right protected by the Constitution or laws of the United States and (2) that the perpetrator of the violation was acting under color of law." Cruz-Erazo v. Rivera-Montanez, 212 F.3d 617, 621 (1st Cir. 2000).

Plaintiffs claim that attempts made by Defendant and others to cause the revocation of permit #904 violate their constitutional rights. Plaintiffs, however, fail to cite any law or facts to support this contention. Moreover, Plaintiffs do not allege that Defendant acted under the color of law. Although Defendant has received a license from the State and he often issues soil evaluations for the purpose of septic system permits, he works as a private soil scientist. Defendant did not act on behalf of the government or under the color of law. See, e.g., Jackson v. Salon, 614 F.2d 15, 16-17, (1st Cir. 1980) (affirming dismissal of section 1983 claim because defendants did not act under color of law). Furthermore, Defendant did not act under the color of law when he filed a complaint with the State regarding permit #904. Thus, viewing the record in a light most favorable to Plaintiffs, they have failed to state a claim pursuant to section 1983.

2. Section 1985 Claim

Section 1985 of the Civil Rights Act allows plaintiffs to initiate actions against those who conspire to interfere with the plaintiffs' civil rights. See 42 U.S.C. § 1985. Plaintiffs accuse Defendant of conspiring to deprive them of their civil rights, which falls within the ambit of section 1985(3). The statute creates a cause of action against those who conspire "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws…" 42 U.S.C. § 1985(3). Plaintiffs make a conclusory claim that Defendant has conspired against them to deprive them of their rights, but they fail to allege facts supporting such an assertion. See Mendez v. Belton, 739 F.2d 15, 19 (1st Cir. 1984) (affirming summary judgment against section 1985 claim because plaintiff failed to allege facts establishing conspiracy claim, and "offered nothing beyond conclusory statements").

To state a claim under section 1985(3), a plaintiff must allege facts showing that: (1) a conspiracy exists; (2) the defendant acted with the conspiratorial purpose of depriving the plaintiff of the equal protection of the laws or of equal privileges and immunities under the laws; (3) the defendant committed an overt act in furtherance of the conspiracy; (4) there has been an injury to plaintiff's persons or property, or a deprivation of a constitutionally protected right or privilege; (5) the defendant conspired against plaintiff because of her membership in a class; and (6) the criteria defining that class are invidious. See Aulson v. Blanchard, 83 F.3d 1, 3-4 (1st Cir. 1996). The last two criteria stand for the proposition "that a plaintiff may recover [under section 1985(c)] only when the conspiratorial conduct of which he complains is propelled by 'some racial, or perhaps

otherwise class-based, invidiously discriminatory animus.'" Id. at 3 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)).

In the present case, Plaintiffs allege that a conspiracy exists, but they have not offered any evidence supporting this contention. They state in the Complaint that Defendants Frick has conspired with Defendants Hardcastle and Meyer to deprive Plaintiffs of their rights, but Plaintiffs do not explain what these three defendants have done. Moreover, Plaintiffs have not offered any proof that Defendant Frick acted with the conspiratorial purpose of depriving Plaintiffs of their rights. Even though Plaintiffs allege that Defendant filed a complaint with the State attacking the validity of permit #904, they do not show how this is part of any conspiracy. Defendant may have committed an overt act – filing the complaint – but Plaintiffs have not made clear whether that amounts to an injury or a deprivation of rights. Finally, Plaintiffs fail to argue that the alleged conspiracy against them arises out of class-based discrimination. Rather, Plaintiff John Burns states in an affidavit that the animus behind the alleged conspiracy to revoke permit #904 is that "they do not like Plaintiff John Burns." (John Burns Aff. at 6 (Docket #42).) This type of animus – personal dislike – does not rise to the level of invidious class-based discrimination that section 1985(3) was created to prevent. See Aulson, 83 F.3d at 6-7 (affirming dismissal of section 1985(3) case because plaintiff was not conspired against because of any invidious class-based discrimination). Thus, Plaintiffs have failed to state a claim under section 1985.

3. Section 1986 Claim

Section 1986 creates a cause of action against persons who have allowed a conspiracy, within the meaning of section 1985, to occur without trying to prevent it. See 42 U.S.C. § 1986. To pursue a claim under section 1986, a plaintiff first must demonstrate that there exists an invidious, class-based conspiracy, according to the requirements of stating a claim pursuant to section 1985(3). See Hennessy v. City of Melrose, 194 F.3d 237, 244 (1st Cir. 1999) (affirming summary judgment of section 1986 claim because plaintiff failed to show a conspiracy based on invidious, class-based animus, which was necessary for his section 1985(3) claim); Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 834-35 (1st Cir. 1982) (affirming summary judgment of section 1986 claim because plaintiff failed to state a claim pursuant to section 1985(3)). Because Plaintiffs fail to successfully allege sufficient facts to support a section 1985(3) claim, their section 1986 claim must fail as well.

IV. CONCLUSION

For the reasons discussed herein, Defendant's Motion to Dismiss, construed as a motion for summary judgment, is GRANTED. The Court hereby finds that Defendant Albert Frick is entitled to summary judgment on all of Plaintiffs' claims.

SO ORDERED.

GEORGE Z. SINGAL
United States District Judge

Dated this 3rd day of November, 2000.

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